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March 27, 2001

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MAR 27 2001

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Magalie Roman Salas, Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Re: Western Wireless Corporation Petition for Declaration as an Eligible Telecommunications Carrier and for Related Waivers to Provide Universal Service to the Crow Reservation in Montana, CC Docket No. 96-45
DA 99-1847

Ex Parte Meeting

Dear Ms. Salas:

On March 26, 2001, Michael Strand and the undersigned, representing Project Telephone Company and Range Telephone Cooperative, met with Anita Cheng, Gene Fullano, Andrea Kearney, Richard Smith, Mark Nadel and Steven Rangel to discuss the above referenced Petition.

The discussion focused on the position of Project and Range that the Commission does not have legal authority to preempt the Montana Public Service Commission and act on the Petition under Section 214(e)(6) of the Communications Act. We noted that in the 12th Report and Order in CC Docket 96-45, the Commission concluded that it would not disturb the grant of eligible carrier status by the South Dakota Public Utilities Commission to a tribally owned carrier serving only on a reservation and that this decision is incompatible with Western Wireless' various legal theories.

Attached is a copy of a "talking points" paper summarizing our positions on the jurisdictional issues which was distributed to the Commission staff at the meeting.

Also discussed were the increases in subscribership on the Reservation since the adoption of the Commission's enhanced lifeline rules, the availability of DSL service to subscribers in the town of Crow Agency, and Project's plan to provide a revised calling plan which will substantially reduce charges for calls to Billings, Montana, the major trading center in the area.

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Please contact me if you have any questions on this matter.

Sincerely

David Cosson

David Cosson FMK
Counsel for Project Telephone Company and Range Telephone Cooperative

Attachment

cc: Anita Cheng
Gene Fullano
Andrea Kearney
Richard D. Smith
Mark Nadel
Steven Rangel

PROJECT TELEPHONE COMPANY
TALKING POINTS

JURISDICTION OF THE MONTANA PSC
TO GRANT ETC DESIGNATION ON THE CROW RESERVATION

1. Factors supporting jurisdiction of Montana PSC

- Communications Act Establishes State Implementation of ETC status as norm
- State Legislation empowers ETC designation, even when PSC does not otherwise have jurisdiction over an entity
- PSC traditional regulation of service on reservations
- Explicit statement by PSC that it will act on petition
- WW acceptance of designation on other reservations [1]
- State interest in effects on off-reservation implications
- Superior knowledge of local conditions
- Service area includes both trust and fee lands, telephone subscribers are both tribal members and non-tribal members; Western Wireless is not a tribal member.
- FCC recognition of state jurisdiction on reservations in Arizona and South Dakota
- FCC rejection of Sec. 332(c)(3) as basis for jurisdiction (12th R&O)
- Burden is on Western Wireless to show that state has no jurisdiction
- If state retains jurisdiction to designate ETC, it is more likely that service providers on reservations in Montana will be able to participate in any future state USF plan.

2. Factors Supporting Conclusion that Montana PSC should not be preempted:

- Every modern case finding preemption involved an established federal Indian-specific program which the state sought to regulate or tax; the federal program occupied the field such that Congress could not have assumed the application of state laws.
- Refusal to preempt Montana PSC does not require finding that tribe has no authority to regulate non-Indians under the exceptions to *Montana*. Such refusal only means that if both have jurisdiction, the PSC retains authority to grant ETC designations under Section 214(e)(2).
- No federal statute indicates a Congressional intent that tribal governments should regulate telephone service provided by non-Indians on reservations. Compare

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[1] Western Wireless has received state ETC designations for service areas including Indian reservations in states such as Kansas, Minnesota and Nebraska. It argues that these state designations are valid because the service areas include territory outside the reservations, but that distinction bears no logical relation to its argument that tribes have exclusive jurisdiction as a result of their inherent sovereignty.

with Clean Water Act which permits EPA to treat tribes as states, 42 U.S.C. 7601(d).

- No federal statute indicates Congressional intent that states should not grant ETC designations on reservations. Legislative history of only statute on point, 47 U.S.C. 214(e)(6) is clear that Congress had no intent to address the question.
- There is no tradition of tribal regulation of telephone service on the Crow or any other reservation.[2]
- Preemption of state as designating authority for ETC would not enhance tribal sovereignty because tribe would not gain authority removed from state.
- Even if tribe has jurisdiction to regulate activities of carriers, state is not preempted where Congress delegated authority to state, not tribe.
- If state regulation of telephone service is preempted by inherent authority of tribal government, then telephone subscribers on reservations everywhere will lose consumer protection of state commissions.
- If tribal sovereignty means state commissions have no jurisdiction to designate ETCs, then all designations on all reservations may be void *ab initio*.
- A non-Indian consenting to jurisdiction of tribe does not thereby work a preemption of otherwise applicable state jurisdiction.
- Preemption would involve making a legislative decision in the absence of Congressional guidance.
- No Supreme Court decision since *Worcester* has found preemption on the sole basis of federal supremacy and tribal sovereignty, standing alone.

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[2] Except for reservations with tribally owned telephone companies.

STATE JURISDICTION IS NOT PREEMPTED BY TRIBAL SOVEREIGNTY, ACT OF CONGRESS OR CONFLICT WITH FEDERAL PROGRAM

Tribal Sovereignty Does Not Preclude State Action on ETC Applications

- Relevant Facts
  - Approximately 25% of Reservation population are non tribal members, living on fee lands which occupy 30% of Reservation. *Montana v. U.S.* at 548.
  - No comprehensive federal program designed to discharge trust responsibilities.
  - No Congressional direction to FCC to treat tribes as states, such as 42 U.S.C. 7601(d) authority to EPA.
  - USF program envisions no regulatory role for tribes, provides no revenue to tribe or state, is applicable throughout country and state has a pre-existing regulatory role.

- No tribal self-government issues
  - No implications for right of Crow Tribe to make their own laws and be governed by them. *Williams v. Lee*, 358 U.S. 217, 220 (1959), *McLanahan v. Arizona State Tax C omm'n*, 411 U.S. 164, 179 (1973) ("In those situations [involving non-Indians] the *Williams* test was designed to resolve this conflict by providing that the State could protect its interest up to the point where tribal self-government would be affected.")

- Tribal sovereignty to regulate non-Indians conducting business on fee lands is extremely limited.

- Inquiry into relevant interests is not a balancing test of competing interests, but a process to discern Congressional intent.

- Modern preemption jurisprudence focuses on Congressional intent rather than inherent sovereignty. *McLanahan* at *172.* Tribal sovereignty is not now an independent basis for preemption of state law, but is a "backdrop against which the applicable treaties and federal statutes must be read." *Rice v Rehner*, 463 U.S.713, 719 (1983) (delegation to tribes to regulate liquor at 18 U.S.C. 1161)

- All cases finding preemption involved state conflicts with tribal interest in development of tribal resources for business opportunity and economic gain., i.e., imposition of state law would directly and substantially decrease tribal revenues from the exploitation of tribal resources.

- Every modern case preempting state law involved an established Indian-specific federal program related to Indian country activities the state sought to regulate, e.g.:

  - *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 327-28 (1983)
  - *White Mountain Apache v. Bracker*, 448 U.S. 136, 146-47 (1980).

- Where state law not preempted, typically state law has no direct economic impact on tribe.

  - *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 185 (1989)
  - *Dept. Of Taxation and Finance of New York v. Milhelm Attea & Bros, Inc.*, 512 U.S. 61, 71 (1994)
  - *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 151 (1979) (upholding state taxes on Indian cigarette sales to non-Indians, which eliminated the tribe's competitive advantage, where tribe's interest in revenues from value generated on reservation did not apply to sales of cigarettes produced off-reservation).

- Where state has historically regulated an activity, there is no tradition of tribal sovereignty over the subject, no preemption results. *Rehner* at 720-25 (lack of historic tradition of liquor regulation)

- Where Congress provides a role for tribal government, historic regulation not necessary

  - *Ramah at* 839-42 Federal role in education envisioned tribal governmental role so state taxation of non-Indian contractor building schools preempted.

There is No Act of Congress Supporting Preemption

- Retention of "absolute" federal jurisdiction over Indian lands in the Adoption Act is not exclusive jurisdiction. *Kake Village v. Egan*, 369 U.S. 60, 68 (1962), ("Absolute mean[s] undiminished, not exclusive," Id. at 369.

- Section 332(c)(3) does not preempt state jurisdiction. 12th R&O, paras. 54-55

State Consideration of ETC Applications Does Not Conflict with Any Federal Program

- Where there is no clear Congressional intent to preempt state regulation, the existence and extent of Indian-specific federal programs must be considered, as well as the existence and extent of tribal government rules, and pre-existing provision of state services.

  - Here the only Indian-specific program is the tribal lifeline program, which contemplates that states will normally act on ETC applications;
  - There are no tribal government rules which conflict with state ETC designation.

- There are pre-existing state services and regulations.

- State regulation, including ETC designation does not conflict with any federal program, much less any program designed specifically to benefit Indians, such as timber management (*White Mountain Apache)* or game management *(Mescalero Apache).*

- To the contrary, the Congressional and FCC universal service support mechanisms contemplate state designation of all areas, unless the state is shown not to have jurisdiction.

RELEVANT SUPREME COURT DECISIONS

Worcester v. Georgia, 6 Pet. 515, 561 (1832)

Georgia statute prohibiting outsiders from being on the reservation unconstitutional.

"The Cherokee nation...is a distinct community, occupying its own territory...in which the laws of Georgia can have no force."

Williams v. Lee, 358 U.S. 217 (1959)

Owner of general store on Navajo Reservation cannot maintain action in state court to collect for goods sold to Navajos residing on the Reservation.

"Over the years this Court has modified these [Worcester] principles in cases where essential tribal relations were not involved and where the rights of Indians, would not be jeopardized, but the basic policy of Worcester has remained..." 358 U.S. at 220.

"Essentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them." Id.

Federal Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99, 116 (1960)

Federal laws of "general applicability" apply to activities in Indian country unless Congress expresses a contrary intent.

Organized Village of Kake v. Egan, 369 U.S. 60, 62 (1962)

Federal preemption on basis of tribal sovereignty in the absence of federal law on the subject is effectively moot.

Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 151 (1979)

State taxes on Indian cigarette sales to non-Indians upheld.

White Mountain Apache v. Bracker, 448 U.S. 136, 145 (1980)

State tax law preempted as applied to timber management program intended to generate revenue and stimulate commercial enterprise.

Preemption inquiry "is not dependent on mechanical or absolute conceptions of state or

tribal sovereignty, but has called for a particularized inquiry into the nature of the state, federal and tribal interests at stake."

United States v. Montana, 450 U.S. 544, 549 (1980)

Montana can regulate non-Indians hunting and fishing on fee lands on the Crow Reservation because tribe lacked inherent sovereignty over the non-Indians, and no treaty or federal law granted jurisdiction. Exceptions to the general rule of no civil regulatory authority over non-members are (1) nonmembers enter consensual relationships with tribe or its members through commercial dealing; (2) conduct of non-members on fee lands threatens or has some direct effect on the political integrity, the economic security or the health or welfare of the tribe.

Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982)

Tribe has inherent power to impose a severance tax on oil and gas production on tribal land, even if state also has power to tax.

"We conclude that the Tribe's authority to tax non-Indians who conduct business on the reservation does not simply derive from the Tribe's power to exclude such persons, but is an inherent power necessary to tribal self-government...." 455 U.S. at 141

Ramah Navajo School Bd. v. Bureau of Revenue, 458 U.S. 832, 840-41 (1982)

Tax of school contractor preempted when significant tribal interest in controlling reservation schools.

Rice v. Rehner, 463 U.S. 713, 718-19 (1983)

"Goal of any preemption inquiry is to determine the Congressional plan."

New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 327-28 (1983)

State game laws preempted from application to federally supported tribal wildlife management program designed to generate revenues and employment and stimulate tribal enterprise

Cotton Petroleum Corp v. New Mexico, 490 U.S. 163, 177 (1989)

No preemption where no economic burden falls on tribe by virtue of state taxes.

Department of Tax. & Fin. Of N.Y. v. Milhelm Attea & Bros, 512 U.S. 61 (1994)

State tax on non-Indian wholesaler of cigarettes to tribe not preempted.

Strate v. A-1 Contractors, 520 U.S. 438, 459 (1997)

Negligent driving by a non-Indian on reservation road does not come within second exception to *Montana* which protects tribal sovereignty only to the extent "necessary to protect tribal self-government or to control internal relations."

OTHER COURT DECISIONS

Montana v. EPA, 137 F.3d 1135, 1141 (9th Cir. 1998)

Affirmed EPA interpretation of clean water act as requiring tribes show inherent sovereignty over non-Indians to receive program delegations.

Big Horn County Electric Coop., Inc. v. Adams, (9th Cir. 2000)

Electric coop formed consensual relationship with tribe under exception 1 to *Montana* rule when it voluntarily provided electric service, but jurisdiction to regulate activities of non-members does not extend to ad valorem tax which is a tax on value of property of non-members, not tax on activity. Exception 2 to *Montana* does not apply because that exception is narrow and would cover any tribal tax, thus having the exception swallow the rule.

Bugenig v. Hoopa Valley Tribe, (9th Cir. 2000)

"[W]hen a tribe attempts to assert regulatory authority over land that is owned and controlled by a nonmember, in confronts a nearly impossible task."